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No. 03-1423

In The
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND OTHER PUBLIC SAFETY ORGANIZATIONS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The Police Officers Research Association of California Legal Defense Fund[1] (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member public safety organizations of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, North Dakota Troopers Association, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. Also joining in this request are the following non-member public safety organizations: National Association of Police Organizations, National Fraternal Order of Police, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs Association. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was not obtained.

The Fund is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund and its member public safety organizations serve peace officers throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The interest of the Fund and the public safety organizations arises because handcuffs are commonly used by peace officers to secure detained persons while executing a warrant to search for contraband in a residence. The analysis employed by the

Ninth Circuit in this case departs from the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981), and introduces confusion concerning the proper use of handcuffs to detain persons while executing a search warrant. The U.S. Supreme Court should reaffirm its guidance in *Summers*, and the appropriateness of using handcuffs during execution of a search warrant.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
1. The Conditions of Detention in *Mena* Were Reasonable Under Existing Case Law	4
A. The Circumstances of the *Mena* Search	5
B. The *Summers* Guidance	6
C. Search Procedures in *Mena* were Reasonable	9
2. Handcuffing is a Reasonable Safety and Security Measure	11
A. Inherent Risk in Execution of Search Warrant	15
B. Planning Execution of Search Warrant Designed to Avoid Risk to Safety of Officers and Detainees	16
C. Handcuffing Is Often the Most Practical Option	17
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Crosby v. Hare, 932 F. Supp. 490 (W.D.N.Y. 1996) 9

Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994)...10, 11, 12, 19

Heitschmidt v. City of Houston, 161 F.3d 834 (5th Cir. 1998) 11, 12, 13, 19

Mena v. City of Simi Valley, 226 F.3d 1031 (9th Cir. 2000) 11

Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003) 2, 13

Mena v. City of Simi Valley, 354 F.3d 1015 (9th Cir. 2004) 2

Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003) 14

Michigan v. Summers, 452 U.S. 692 (1981).....*passim*

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002) 17

People v. Ornelas, 937 P.2d 867 (Colo. App. 1996) 9

Saucier v. Katz, 533 U.S. 194 (2001)..... 11

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) 18

Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001) ... 17, 18

U.S. v. Fountain, 2 F.3d 656 (6th Cir. 1993), *cert. denied*, 510 U.S. 1014 (1993)..... 9, 15

TREATISES

W. LaFave, SEARCH AND SEIZURE (3d ed. 1996) 3, 4, 8, 11

STATEMENT OF INTEREST

The *Amici Curiae* are the Police Officers Research Association of California Legal Defense Fund (Fund) and other public safety organizations. The Fund's member public safety organizations are: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, North Dakota Troopers Association, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. The following non-member public safety organizations join in this brief: National Association of Police Organizations, National Fraternal Order of Police, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs Association. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington. The non-member public safety organizations represent law enforcement personnel at every level of

[1] Counsel for the parties did not author any part of this brief. The Fund made the entire and sole monetary contribution to preparation and submission of this brief.

crime prevention and investigation, nationwide and internationally. These organizations are active representative groups working to protect and secure the laws and work of their law enforcement members.

Petitioners have consented to filing this brief. Respondent has not consented to filing this brief.

The *Amici* strongly support the Petitioners. The decision in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) and the order denying rehearing en banc published at 354 F.3d 1015 (9th Cir. 2004) will adversely affect the safety, personal liability and employment relations of the members represented by the Fund and the public safety organizations. Furthermore, the decision in *Mena* will adversely affect the safety of detainees during the execution of search warrants for contraband in routine circumstances.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in maintaining clear and consistent guidelines on the use of handcuffs to secure detained persons during execution of a search warrant, similar to Officers Muehler and Brill in *Mena*. It is not an uncommon practice for peace officers, while executing a warrant to search for contraband in a residential building, to secure the occupants by handcuffing them and holding them in a central location during a search.

The officers in this case, Officers Muehler and Brill, did reasonably believe that their plans and actions in execution of the search warrant fit within the guidelines of *Michigan v. Summers*, 452 U.S. 692 (1981) case. There was

an apparent risk to officers when searching a residence for contraband, namely a gun used in a gang shooting. The officers had the reasonable expectation that gang members or sympathizers would be present. The potential for violence or secreting contraband was clear. Detaining occupants in handcuffs was necessary while the search was conducted, to reduce the safety risks to officers and detainees alike. No detainee was held in severe, humiliating or unnecessarily rigorous conditions. The officers' actions appeared consistent with existing case law in the Ninth Circuit and other circuits. As such, the officers are entitled to qualified immunity.

The Ninth Circuit decision in *Mena* treated handcuffing as an unusual case, and departed from the guidance of the U.S. Supreme Court in *Michigan v. Summers,* 452 U.S. 692 (1981). The *Mena* decision substantially diminishes the capacity of law enforcement officers to apply clear and workable rules from the *Summers* decision in routine circumstances, and diminishes the latitude law enforcement officers need to make reasonable decisions on detention conditions. As noted Professor Wayne R. LaFave has pointed out, if ad hoc determinations dominate the execution of a search warrant, it is difficult to comprehend and apply relevant factors correctly. The prospect for correct application, i.e., protecting liberty and privacy, are reduced. 2 W. LaFave, SEARCH AND SEIZURE sec. 4.9(e), pp. 649-650 (3d ed. 1996). The consequence is uncertainty and the potential need to employ greater force to maintain control of detainees. Handcuffing should be treated as one of the conditions of detention to be evaluated in the context of the *Summers* guidelines, and not treated as a separate or singular condition. This approach provides law enforcement officers clear and workable guidelines and sufficient latitude to carry out their duties while protecting

the liberty and privacy of detainees. The privacy and liberty interests of detainees can be protected within this framework. The Supreme Court should reaffirm the guidelines in the *Summers* case and their applicability to the use of handcuffs.

ARGUMENT

1. The Conditions of Detention in *Mena* Were Reasonable Under Existing Case Law.

In *Summers*, the U.S. Supreme Court established guidelines that allow law enforcement officers to adopt standardized procedures for the execution of warrants to search for contraband at residences and for the detention of occupants. The *Summers* decision did not address the use of handcuffs to detain occupants. However, the *Summers* decision did acknowledge the great importance of minimizing risk to the law enforcement officers, and did recognize the need for law enforcement officers to maintain unquestioned control of the situation. *Summers v. Michigan,* 452 U.S. at 702-703. Law enforcement officers often use handcuffs for this reason. Inherent in these guidelines is latitude for law enforcement officers to employ reasonable, reliable and available means to execute a search warrant. As Professor LaFave has pointed out, the Supreme Court produced a rule that did not depend significantly on ad hoc determinations where an officer is required to evaluate in detail the justification for detention or the extent of intrusion imposed on detainees. 2 W. LaFave, Search and Seizure sec. 4.9(e) p. 649 (3d ed. 1996). Rather, a neutral magistrate has already found probable cause when determining whether to issue a search warrant. Police focus their attention on the reasonable and

expeditious execution of a search warrant in identified and expected circumstances.

A. The Circumstances of the *Mena* Search.

The *Mena* search occurred in 1998. The facts are drawn from the Petition. Officers Muehler and Brill were investigating a gang-related drive-by shooting. One of the suspects was a gang member linked to a missing gun and known to have lived at the residence to be searched. The residence was a house that had been modified to accommodate many separate living quarters for many persons. Gang members were known to live there. The residence was possibly a gang "safe house." The officers obtained a warrant to search the entire residential property specifically for weapons and evidence of gang membership. Anticipating that gang members and weapons may be present, the residence was secured by a SWAT team. Four occupants were present, including plaintiff. All were first confronted by the officers with drawn weapons. The occupants were handcuffed and taken to a furnished garage used as a living unit where they were held in handcuffs until the search was completed in two or three hours. The search produced a gun, ammunition, drugs, baseball bats and gang paraphernalia.

Plaintiff appeared to be a young and apparently healthy woman of Hispanic appearance. She was confronted while she slept in her room. She was wearing a long-sleeved tee-shirt and sweatpants as pajamas. After she was taken to the garage she was given a jacket and shoes. She was allowed to move about the garage. The other detainees were there as well. Plaintiff never asked to have her handcuffs loosened. Plaintiff, and as the other

detainees, was asked about her immigration status. One occupant was found to be an illegal alien. It was known that gang members and their affiliates were often illegal aliens.

This case was a routine search for contraband in which the law enforcement officers had reasonable concerns for safety and the destruction or hiding of contraband, and reason to believe that one or more occupants of the residence may be gang members or affiliated with gang members.

B. The *Summers* Guidance.

For over twenty years law enforcement officers have planned operations for the execution of search warrants using the guidance provided by the U. S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981). *Summers* provided clear and workable rules with reasonable latitude to allow law enforcement officers to judge their actions and for law enforcement agencies to establish policies for execution of search warrants for contraband, including " . . . the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.*, 452 U.S. at 705. Under *Summers,* no particularized reasonable suspicion is required to detain an occupant.

The *Summers* court identified legitimate reasons for detention of occupants of the premises to be searched, including:

1. To prevent flight;
2. To minimize the risk of harm to officers;
3. To prevent the destruction or hiding of evidence; and

4. To facilitate an orderly and complete search.

Id., 452 U.S. at 702-703. The *Summers* court limited the period of detention to the time it took to conduct a "proper search" for contraband. *Id.*, 452 U.S. at 705. In this regard, the court was aware that a search could take several hours. *Id.*, 452 U.S. 711 (Stewart, J., dissenting).

The *Summers* court did not require evidence of a special danger to justify detention for safety reasons. The court said:

> "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

Id., 452 U.S. at 702-703.

Officers Muehler and Brill had reason to expect danger to the officers and the SWAT team. The officers had reason to make plans to minimize the risks based on the generalized risks identified in *Summers* and the particular risks known to the officers in this case. The officers expected to face multiple occupants, possible gang members or sympathizers, the likelihood of guns and drugs, and premises divided into many individual dwelling units. Securing the premises and maintaining security was a complicated matter.

The *Summers* court made it clear that it was adopting a categorical and reasonable rule, not a method of ad hoc analysis, to guide detention: "The rule we adopt today does

not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.*, 452 U.S. at 705, n. 19.

This approach has been justifiably praised. In his treatise, Professor Wayne R. LaFave praised the court's opting for a standardized procedure. He said:

> "This is because it reflects express recognition by the Court of the desirability of the standardized procedure alternative and also because it illustrates a very sound use of that approach. As pointed out elsewhere, standardized procedures are often to be preferred over ad hoc determinations because, in the long run, they will advance rather than reduce the protection of liberty and privacy. A legal principle which would produce the theoretically correct result 100% of the time but which is so difficult to comprehend and apply that at best it will be correctly used by the police only 75% of the time is not to be preferred over a standardized procedure which can be correctly applied in virtually all cases but which will produce the theoretically "correct" result only 95% of the time."

2 W. LaFave, Search and Seizure sec. 4.9(e), pp. 649-650 (3d ed. 1996).

Officers Muehler and Brill made a reasonable plan and executed their plan reasonably within the framework set forth in the *Summers* case and the facts known to them.

C. Search Procedures in *Mena* Were Reasonable.

Law enforcement agencies routinely develop plans for execution of search warrants. Handcuffing detainees may be planned if known circumstances make these actions reasonable at the time planning is done. Such circumstances include officer safety concerns where multiple persons may be detained; where weapons and drugs are expected to be present; and where the residence is unfamiliar and not easily secured. Court cases at the time of this search indicated that this approach was and is acceptable. Courts have described the procedures used by police departments to execute warrants to search for drugs, all without criticizing the use of handcuffs *per se*. In *U.S. v. Fountain,* 2 F.3d 656 (6th Cir. 1993), *cert. denied*, 510 U.S. 1014 (1993) the court held it reasonable and proportional for safety and evidence concerns to hold four men in a living room, handcuffed and lying on the floor while a warrant to search for drugs was conducted. In *People v. Ornelas,* 937 P.2d 867 (Colo. App. 1996) the court rejected an argument that the defendant was arrested as soon as he was handcuffed and relied on *Summers* to evaluate the reasonableness of the detention with handcuffs. In *Crosby v. Hare,* 932 F. Supp. 490 (W.D.N.Y. 1996) where the court held that absent special circumstances and without individualized suspicion it was reasonable for officers' safety that a naked woman (She was showering at the time police entered the premises.) be held first at gunpoint and then in handcuffs while officers conducted a security sweep of the residence before being allowed to dress and brought to the holding area in the residence. The issue was safety, not suspicion.

At the time of the *Mena* search, the Ninth Circuit had not considered handcuffing *per se* to be a unique issue. In

Franklin, the Ninth Circuit did not criticize the plan of the Portland Police Bureau to pat search and handcuff occupants of the residence and then detain them in a central location. Rather, the court found that the manner of detention was unjustified when an elderly disabled man, who was unable to walk or sit up without assistance because of multiple sclerosis, was kept in handcuffs that hurt him for a long period of time, wearing only a tee-shirt and with his genitals exposed to everyone in the living room where the detainees were kept. *Franklin v. Foxworth,* 31 F.3d 873, 876-878 (9th Cir. 1994). It was the pain, humiliation and indifference to the circumstances of the detainees, not the handcuffs that mattered.

The execution of the search warrant in *Mena* was reasonable in light of the cases existing at that time and in light of the circumstances reasonably known to officers Meuhler and Brill as stated above. Furthermore, the facts indicated that the search warrant was executed diligently, and that detainees were not subjected to pain, humiliation, or debility making their conditions unduly rigorous. Under the circumstances, the actions of Officers Meuhler and Brill were not clearly unlawful.

The court cases concerning the use of handcuffs have produced mixed results, but the actions of Officers Meuhler and Brill did not appear to exceed the guidelines in *Summers* or involve circumstances in cases where handcuffing was one of the factors leading to liability on the part of law enforcement officers. A comparison of the plaintiffs in the *Foxworth* and *Mena* cases shows apparently significant differences in the light of safety concerns for the officers. In *Mena,* the plaintiff was an apparently healthy young female without disability, who was able and allowed to move about the room where she was detained.

She was fully clothed, and she was provided with additional clothing. She did not complain of pain. In *Foxworth,* the plaintiff was a sick old man, scantily clothed and exposed to others in the room. He was unable to move without assistance and he was left in pain and discomfort even after he had asked for assistance. Officers Meuhler and Brill had no reason to believe they had crossed the line.

Officers Meuhler and Brill are entitled to qualified immunity. As the court pointed out in *Saucier v. Katz,* 533 U.S. 194 (2001) the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*, 533 U.S. at 202.

2. Handcuffing Is a Reasonable Security Measure.

In 1996 Professor Wayne R. LaFave noted that the use of handcuffs to secure detained occupants may affect the length of detention. 2 W. LaFave, SEARCH AND SEIZURE sec. 4.9(e) (3d ed. 1996). In the 2004 supplement, Professor LaFave cited several cases from the Fifth and Ninth Circuits, including *Mena v. City of Simi Valley,* 226 F.3d 1031 (9th Cir. 2000) which might be contrary to decisions in the Second, Third and Sixth Circuits. Professor LaFave noted that some courts were concerned with use of handcuffs in circumstances that made their use onerous or unnecessary.

The *Heitschmidt v. City of Houston,* 161 F.3d 834 (5th Cir. 1998) and *Franklin v. Foxworth,* 31 F.3d 873 (9th Cir.

1994) cases expressed concern with the manner detention was carried out and the circumstances that could make detention unreasonably intrusive and unjustified. Handcuffing was only one of the circumstances causing concern to these courts. The courts were concerned with the total circumstances indicating unnecessary and onerous conditions imposed on the detainees.

In *Heitschmidt,* the detainee was required to sit on a bar stool in his residence for 4.5 hours while handcuffed. The warrant was issued to search for records of prostitution, i.e., evidence, not contraband. The police knew the detainee and expected him to be at his residence. They had no reason to consider him a suspect or to expect that he would interfere with the search, pose a safety threat, or flee. This was significant because police lured the plaintiff from his home on a police ruse, relying on their expectation that he would willingly cooperate with the police. The police then forcibly handcuffed him and brought him back into his home. In this case detention was unnecessary. *Heitschmidt v. City of Houston, supra,* 161 F.3d at 838-839.

In *Franklin,* an elderly, incontinent, seriously disabled man with multiple sclerosis, who could not walk or sit without assistance, was held for over two hours in handcuffs, dressed only in a tee-shirt with his testicles exposed to men and women in the living room where detainees were held. He complained about pain, but his complaints were ignored for a substantial period of time before police took action to relieve his distress or cover him. In this case, plaintiff suffered conditions that can only be described as harsh. *Franklin v. Foxworth, supra,* 31 F.3d at 876-878.

These cases demonstrate the special circumstances the *Summers* court may have anticipated in its footnote stating that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." 452 U.S. at 705, n. 21. The *Heitschmidt* court employed the *Summers* limits and found that "none of those factors that the Supreme Court used to explain why the detention in *Summers* was justified by legitimate police interests should be given any significant weight in this case." *Heitschmidt v. City of Houston, supra,* 161 F.3d at 839.

Latitude is necessary if law enforcement officers are to execute search warrants safely and efficiently in circumstances where they cannot know or anticipate all the circumstances they will face. That is a benefit of reliance on standardized procedures. The procedures will minimize ad hoc decision-making at the scene and reduce the chance of erroneous judgments by law enforcement officers. This in turn serves to maximize the safety of the officers and the detainees, because the officers retain control of the scene and avoid the necessity to escalate force to maintain control.

There is no significant reason to single out handcuffing as somehow suspect *per se*. Yet, that appears to be the direction the Ninth Circuit is heading. In *Mena,* the court held that " . . . because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals – such as physical roughness, threatening deadly force, and using handcuffs for an extended period." *Mena v. City of Simi Valley, supra,* 332 F.3d at 1263. For the first time, the Ninth Circuit identified handcuffs as a "heightened

security measure." Thus, it appears that in the Ninth Circuit handcuffing detainees is a special circumstance taking many searches out of the standardized procedures sanctioned by the *Summers* court. In doing so, the Ninth Circuit appears to have substantially downplayed the factors showing that the *Mena* case fits within the limitations set out in *Summers* and commonly recognized by other Circuit Courts.

The Ninth Circuit may have advanced the view that handcuffing *per se* is a unique case or circumstance requiring special justification in *Meredith v. Erath,* 342 F.3d 1057 (9th Cir. 2003). *Meredith* involved execution of a warrant by IRS agents to search for evidence of income tax code violations in a commercial building, not the search for contraband in a residence. However, agents discovered an occupant on the third floor of the building, which agents did not know was used as a residence. The occupant was handcuffed and detained until the search was concluded. With this decision, the Ninth Circuit announced that merely handcuffing a person and detaining her in handcuffs during a search for evidence was a violation of the Fourth Amendment, "absent justifiable circumstances." *Id.*, 342 F.3d at 1063. The court's ruling referred generally to execution of a search warrant for evidence and investigatory detentions. *Id.*, 342 F.3d at 1062. The Ninth Circuit also specifically noted that the *Summers* case did not involve handcuffing detainees. *Id.*, 342 F.3d at 1063.

The *Meredith* and *Mena* cases could be viewed as making handcuffing an unusual circumstance for which particularized suspicion against a detainee must first be established. Such an approach would make the standard procedures approach adopted in the *Summers* decision impractical in most cases, because law enforcement

officers will not have the level of precise and particularized information necessary to plan for execution of a search warrant in a safe and effective manner. Law enforcement officers will be compelled to make most of their decisions in the field rather than adopting a reasonable planned approach to detention decision and adapting to circumstances found in the field based on the application of clear and workable guidelines.

A. Inherent Risk in Execution of Search Warrant.

Any person who is not infirm and is in the milieu of guns, drugs and gangs, cannot be assumed to be harmless. Risk is inherent in the situation. As the court noted in *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981) "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." So long as the search is carried out expeditiously and not prolonged for unrelated reasons, detaining occupants in handcuffs and questioning occupants may be prudent and reasonable, unless other egregious circumstances develop that clearly make the conditions of confinement unduly painful, humiliating, prolonged or unnecessary.

In the circumstances in the first search warrant executed in *United States v. Fountain,* 2 F.3d 656 (6th Cir. 1993) Fountain had time to partially dispose of drugs before he could be stopped. There were semi-automatic weapons also in the house. *Id.*, 2 F.3d at 659. Had Fountain chosen to pick up a weapon, the danger in executing the search warrant is obvious. Every stop and every approach to a residence bears with it the risk that a weapon will be used where persons and surroundings are

unfamiliar and not under the control of law enforcement officers.

B. Planning Execution of Search Warrant Designed to Avoid Risk to Officer Safety and Necessity to Employ Greater Force Against Detainees.

When planning the tactics for entry, officers must anticipate the risks identified in *Summers* (flight, destruction of evidence, safety, and interference with the search). It is necessary to maintain control of the place and the occupants, whose cooperation and passivity cannot be assured. It is reasonable to detain occupants in handcuffs rather than depend upon other potentially more violent means of maintaining security. After entry into the residence is secured, law enforcement officers still have limited information about the occupants. Where the premises are divided into many individual dwelling units occupied by strangers, securing the premises and persons is more difficult. Law enforcement officers cannot assume that a person who is passive while in handcuffs will remain so if released. The options to maintain control are limited. Law enforcement agencies have only limited numbers of personnel. Decisions must be made before executing the search warrant how many personnel to deploy, and that determines whether occupants can be held singly or must be held in a common area. If all occupants are brought together in a common area and remain without handcuffs, they can be guarded. However, if the occupants ignore voice commands, law enforcement officers have little choice but to escalate to the use of force. The range of force ranges from hands-on physical restraint to the use of weapons of moderate force, such as a taser, pepper spray or a baton, to deadly force. The point of

planning for execution of a search warrant, however, is to avoid circumstances that require the escalation of force and to prevent loss of control.

C. Handcuffing is a Practical Option.

Handcuffing detainees is merely one of the conditions of detention to be evaluated according to the guidelines in *Summers*, and law enforcement officers should have reasonable latitude to make judgments on the scene and at the time of the search. Handcuffing detainees is often the most practical option. In search warrant cases involving handcuffing detainees, one does not find examples of moderate to deadly force being used. The reason is that law enforcement officers maintain control of the situation.

In contrast, one can consider the use of deadly force in chase cases. These cases demonstrate the contrast between the containment of a person and actual control of a person. In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) the suspect engaged police in a hazardous high-speed chase, and he had used his vehicle. He was trapped in a cul-de-sac, but remained in his car with the engine running. The police approached him with weapons drawn and ordered him to get out of his car. The suspect did not do so. Within moments an officer fired on the suspect, and the car began to move forward. The court held that the police were entitled to qualified immunity because no clear law put the police on notice that their use of force was unlawful in these circumstances. *Id.*, 283 F.3d at 1282-1283.

In *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001) the police chased a suspect in an armed robbery on foot. The suspect was ordered to stop, but he reached below his waist with his back to the officers. The officers' view was

obscured, and they shot and killed the suspect. No weapon was found. The court held that the officers were entitled to qualified immunity because it was not constitutionally required that an officer set eyes upon a weapon before employing deadly force. *Id.*, 257 F.3d at 898, 899.

In *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992) the court granted qualified immunity to a police officer who had shot a killed a suspect in a high-speed vehicle chase after the police blocked the suspect in his vehicle in a dead end street. The suspect backed his vehicle up and then moved forward as if to ram or go around the police vehicle. The court found that it would not second guess a police officer required to make a split second decision on the scene whether to stop a suspect or not. *Id.*, 954 F.2d at 346-347.

These cases involve suspects who arguably had demonstrated a risk to officer safety, and not merely persons detained during execution of a search warrant. But the contrast between confinement and control is instructive. Even when a person is confined in a narrow area, he or she can pose a risk to officer safety. Once verbal warnings are ignored, the situation escalates quickly to the use of force. The situation becomes immediately more dangerous.

If the use of handcuffs to maintain control of detainees is narrowly restricted, law enforcement officers will be under increased pressure to use force to maintain or regain control of detainees in close proximity to officers. The risk of error and overreaction will be greatly increased. Having given up control for containment, the options for law enforcement officers are only for greater use of force. Unlike chase cases, where law enforcement

officers may have the option of letting a suspect flee, law enforcement officers executing a search warrant have no such option. The issue is not whether the occupant is a known suspect. Rather, the issue is avoiding the risk that force must be employed. The safety of the officers and the occupants must be given priority.

A sufficient number of cases have developed to demonstrate that the standardized procedural approach set forth in the *Summers* decision is sound and can accommodate consideration of the conditions of confinement, including handcuffing detainees, without immediate resort to the "unusual case" exception. It is also apparent that handcuffing is only one of many circumstances taking the case outside the *Summers* limitations.

CONCLUSION

This Court should reaffirm the standardized procedural approach adopted in *Summers,* and establish that handcuffing detained persons occupying a residence during a search for contraband pursuant to a valid search warrant is not a special circumstance or unusual case *per se*. Rather, handcuffing, as all other conditions of detention, must be evaluated according to the guidelines in *Summers*. As a matter of public policy, occupants and law enforcement officers will be better served by clear guidelines. Cases involving egregious circumstances, such as those found in the *Heitschmidt* and *Franklin* cases, will remain unusual cases where the guidelines of the *Summers* decisions have been clearly exceeded.

This approach is consistent with the purposes underlying the qualified immunity defense, which is intended to

provide law enforcement officers with some reasonable margin for error so they may carry out their duties without undue fear of civil liability.

For the reasons stated herein, the Fund and the public safety organizations respectfully request that this Court find that the conduct of this search fit within the *Summers* limitations, including the use of handcuffs, and Officers Meuhler and Brill are entitled to qualified immunity.

Respectfully submitted,

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